

2012 WL 1621938 (Md.) (Appellate Brief)  
Maryland Court of Appeals.

Darnella THOMAS, et vir., Appellants,  
v.  
Jeffrey NADEL, Substitute Trustee, et al., Appellees.

No. 106.  
September Term, 2011.  
February 21, 2012.

Appeal from the Circuit Court for Carroll County (the Honorable Thomas F. Stansfield, Judge)

**Brief of Appellees**

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## **\*1 STATEMENT OF THE CASE**

Appellants Darnella Thomas and Charles Howard Thomas, Jr. appeal the ratification of the foreclosure sale of their home, and denial of their exceptions to such sale. Appellants have been in default since approximately May 1, 2008, and filed four successive bankruptcy petitions to stave off the foreclosure sale. Ultimately, the bankruptcy court allowed the secured party to proceed with foreclosure. Based upon Appellants' claim that they had a loan modification agreement pending with the secured party, the circuit court initially stayed the foreclosure case. At that time, Appellants did not challenge the debt or the secured party's right to foreclose. Rather, after the sale, Appellants filed exceptions speculating that the secured party was not the proper owner of their mortgage debt. The trial court denied such belated claim under the Court of Appeal's standard set forth in *Bates v. Cohn*, 417 Md. 309, 9 A.3d 846 (2010).<sup>1</sup>

## QUESTIONS AND ISSUES PRESENTED

1. Did the circuit court err when it denied the Appellants' Exceptions as untimely where they failed to challenge Biltmore's rights prior to the sale? (No)
2. Does post-ratification correspondence received by the borrower pursuant to federal law that indicates the post-sale transfer of loan by the secured party affect the vitality of the sale? (No)

### \*2 CONCISE STATEMENT OF FACTS

On September 29, 2006, Appellants borrowed \$492,000.00, evidenced by a promissory note (the "Note"), and secured by a deed of trust (the "Deed of Trust") that encumbered Appellants' home at 4812 Woodbine Road, Sykesville, Maryland 21784 (the "Property"). [E.6].

On May 1, 2008, Appellants stopped making the monthly mortgage payments required by the Note.<sup>2</sup> Sixteen months later, on September 14, 2009, the secured party's notice of intent to foreclose was sent identifying Biltmore Specialty Investment I LLC as secured party, and identifying BSI **Financial** Services, Inc. as loan servicer. [E.22]

After Appellants were served with notice of intent to foreclose, on November 9, 2009, the holder of the Note, Biltmore Specialty Investments II, LLC ("Biltmore"), appointed Appellees as Substitute Trustees under the Deed of Trust. [E. 23-24]. Three days after their appointment, on November 12, 2009, Appellees initiated a foreclosure action against the Property by filing an Order to Docket in the Circuit Court for Carroll County. [E.25, 66].

Accompanying the Order to Docket, Appellees filed an Affidavit Certifying Ownership of Debt Instrument, [E.26] in which a member of Biltmore averred under oath that it "is the holder of the debt instrument secured by the Mortgage or Deed of Trust which is the subject of the instant foreclosure action." [E.26]. Appellees also \*3 filed with the Order to Docket a copy of the Note, which was specially indorsed to Biltmore. [E.1-5]. On December 9, 2009, the Order to Docket and accompanying papers were served upon Appellants. [R.16,19].

On four separate occasions between the time of the filing of the foreclosure case and the foreclosure sale itself, Appellants were able to stave off the sale by repeated bankruptcy filings. *In Re: Charles H. Thomas, et ux.*, D.Md. Bky. Case No. 10-10402 (January 8, 2010), *In Re: Charles H. Thomas, et ux.*, D.Md. Bky. Case No. 10-16233 (March 23, 2010), *In Re: Charles H. Thomas, et ux.*, D.Md. Bky. Case No. 10-22446 (June 3, 2010); *In Re: Charles H. Thomas*, D.Md. Bky. Case No. 10-32141 (September 27, 2010); *see also* [R-25] (Suggestion of Bankruptcy).

In the third case, Case No. 10-22446, Appellants' proposed Chapter 13 Plan, filed on June 22, 2010, identified BSI **Financial** Service as claimant, who they proposed to pay pursuant to the plan. [Apx-1]. No plan was confirmed, and on July 2, 2010, upon motion by Biltmore, the Court ordered that the automatic stay did not affect the property. [Apx-5]. Ultimately the bankruptcy case was dismissed. In the fourth case, Appellant Charles Thomas expressly identified Biltmore as the secured party on Schedule D of his sworn bankruptcy filings. [Apx-8-10]. Ultimately, like the preceding three bankruptcies, the fourth case was dismissed.

Thereafter, in the Circuit Court of Carroll County, on August 25, 2010, Appellants sought a pre-sale injunction claiming that they had an existing loan modification with BSI, claiming that they were eligible for a loan modification under \*4 the federal HAMP program, and requesting that the sale date be postponed 60 days. Specifically, Appellants' motion stated:

We have a modification program in with BSI and we are eligible for a loan modification in the HAMP Program. So I'm ask [sic] if we can [have] 60 days extension on the sale date. Thank you so much.

[Apx-11].

Two days later, on August 27, 2010, the circuit court stayed the sale for 60 days and set a hearing on the emergency motion, and on September 20, 2010, following the hearing, dissolved the stay.

The property was sold on November 12, 2010, to Biltmore for \$410,000. [E-29]. Appellants filed Exceptions to the sale [E. 31-64],<sup>3</sup> claiming for the first time, that Biltmore was not the owner of Appellants' mortgage debt. [E. 31-40]. Appellees opposed the motion, explaining their purported exception was a pre-sale objection that should have been asserted in advance of the foreclosure sale pursuant to [Maryland Rule 14-211](#), and that the Appellants' argument was without foundation or merit. Appellees further advised the circuit court that they were in possession of the original promissory note, which was specially indorsed directly to Biltmore. [E. 65-76].

On March 22, 2011, the circuit court held a hearing on the Exceptions. [E. 121-159]. At the hearing, relying upon [\\*5 Bates v. Cohn, 417 Md. 309, 9 A.3d 846 \(2010\)](#), the Court determined that Appellants' challenge to Biltmore's rights in the loan should have been made presale, and was therefore not properly or timely raised in the context of a hearing on exceptions to a foreclosure sale. [E.128-129]. Consistent with *Bates*, the circuit court explained:

Now, the sale occurred on November 12, 2010. It was later reported to this Court. The issue at this juncture, as far as I see it, is whether or not the evidence seduced and produced results in any irregularity on the conduct of the sale, the advertisement of the sale or any post-sale matters that would cause the Court to not ratify the sale or a resale.

Now, I am aware that there are an awful lot of contentions about irregularities of assignments, transfers and other matters concerning ownership of loans and right to foreclose. Let me say this.

Let us assume the truth of everything that the witness said about the irregularities. As I understand the case law and the rules, *all of that was or could have been produced by a motion to stay prior to the actual sale and should have been the subject of evidentiary proof and a ruling prior to the sale and cannot be raised under what I - under what is the case now post-sale.*

This witness, like any lawyer, would have to come back into it and say, "Well, there is nothing of record." Well, that is par for the course. The Appellate Courts have not held that the Trustees may not proceed upon indications of ownership of the note if it is waived in a situation such as this and not brought up timely.

I don't think, if all of the evidence is produced and is found to be accurate, that a case has been made to sustain the exceptions and set aside the sale under the case law, as I understand it, and under the law of real property, as I understand it.

**\*6** I think, therefore, that ratification of the sale is in order. I understand the argument that there are defects in the assignment of the notes alleged. Mr. Thomas, had that been properly brought forth with proper evidence at the time, ownership of the note - we would have conducted a trial on that issue but I do not think that I am in a posture to entertain that post-sale.

[E. 150-152].

Accordingly, the circuit court overruled the exceptions and ratified the foreclosure sale. In addition, at the hearing, following the Court's ruling, Appellees supplemented the record by producing the original Note, which the Court accepted without objection, and a copy of which was filed as an exhibit. [E. 152-154][E.1-6].

#### STANDARD OF REVIEW

From a bench trial, the appellate court's review of the trial court's judgment on the evidence is subject to the clearly erroneous standard, "giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." *El Bey v. Moorish Science Temple of America, Inc.*, 362 Md. 339, 353, 765 A.2d 132, 139 (2001) (citing [Md. Rule 8-131\(c\)](#)). The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party. *General Motors Corp. v. Schmitz* 362 Md. 229, 234, 764 A.2d 838, 840 (2001). "If there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Thomas v. Capital Medical Management Associates, LLC.* 189 Md. App. 439, 985 A.2d 51, 60 (2009) (quoting <sup>\*7</sup> *L.W. Wolfe Enters. v. Md. Nat'l Golf. L.P.*, 165 Md. App. 339, 343, 885 A.2d 826 (2005) (quoting *YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663, 874 A.2d 411(2005))).

However, "[t]he deference shown to the trial court's factual findings under the clearly erroneous standard does not, of course, apply to legal conclusions." *Nesbit v. Gov't Employees Ins. Co.*, 382 Md. 65, 72, 854 A.2d 879 (2004). Instead, a trial court's legal conclusions are reviewed de novo. *Goff v. State*, 387 Md. 327, 337-38, 875 A.2d 132 (2005). Nonetheless, "[i]t is well established in Maryland that, in an appeal from a final judgment, the appellate court may affirm the court's decision on any ground adequately shown by the record." *Norman v. Borison*, 192 Md. App. 405, 419, 994 A.2d 1019 (2010) (citations omitted).

As to exceptions to a foreclosure sale, the "[t]he party putting forth the exceptions to the sale must prove the substance of his contentions in respect to the irregularity in the manner in which the sale was held. The invalidity of a mortgage sale, like other judicial sales, is not presumed, and the burden of proving the contrary is on the one attacking the sale." *Greenbriar Condominium v. Brooks*, 387 Md. 683, 742, 878 A.2d 528, 564 (2005) (internal quotations and citations omitted). Moreover, "[E]xceptions shall be in writing, [and] shall set forth the alleged irregularity with particularity... Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." [Md. Rule 14-305\(d\)](#).

## \*8 DISCUSSION

### I. THE CIRCUIT COURT PROPERLY DENIED THE APPELLANTS' EXCEPTIONS AS UNTIMELY. NOR DOES THE RECORD SUPPORT APPELLANT'S ATTACK UPON BILTMORE'S RIGHTS.

Appellants contend that the circuit court committed error because the evidence allegedly reflected that Biltmore "never properly acquired a possessory interest in the Note" and therefore, "did not have authority to appoint Appellees as Substitute Trustees...." App. Brief at p. 6. This argument fails for two separate reasons: (1) the argument was procedurally improper under *Bates*; and (2) the proffered evidence reflects that Biltmore was the proper secured party to initiate foreclosure proceedings.

The circuit court properly denied Appellant's challenge to Biltmore's rights as procedurally improper in the context of exceptions of the foreclosure sale. Indeed, this Court recently reaffirmed that, after a foreclosure sale, a challenge to the foreclosure sale is limited to procedural irregularities at the sale or the statement of indebtedness. See *Bates*, 417 Md. 309, 9 A.3d at 853 ("As we stated in Greenbriar, after a foreclosure sale, 'the debtor's later filing of exceptions ... may challenge only procedural irregularities at the sale or ... the statement of indebtedness.' Id. Such procedural allegations may charge that 'the advertisement of sale was insufficient or misdescribed the property, the creditor committed a fraud by preventing someone from bidding or by chilling the bidding, challenging the price as unconscionable, etc.'" (quoting *Greenbriar*, 387 Md. at 688, 878 A.2d at 531)).

<sup>\*9</sup> In *Bates*, the Court explained that, where a borrower seeks to challenge the validity of the deed of trust or the right of the lender to foreclose, she must do so prior to the foreclosure sale pursuant to [Maryland Rule 14-211\(a\)\(1\)](#). See *Bates*, 417 Md. at 318-319, 9 A.3d at 852 ("Before a foreclosure sale takes place, the defaulting borrower may file a motion to 'stay the sale of the property and dismiss the foreclosure action.' [Md. Rule 14-211\(a\)\(1\)](#). The borrower, in other words, may petition the court for injunctive relief, challenging 'the validity of the lien or... the right of the [lender] to foreclose in the pending action.' [Md. Rule 14-211\(a\)\(3\)\(B\)](#).").

“The timing of this remedy is not elective.” *Bates*, 417 Md. at 320, 9 A.3d at 853 (quoting *Greenbriar*, 387 Md. at 740-41, 878 A.2d at 563). “Should a sale occur,... the debtor's later filing of exceptions to the sale may challenge only procedural irregularities at the sale or the statement of indebtedness...” *Bates* at 320, 9 A.3d at 853.

“Once the property is sold at foreclosure, the borrower may file a claim pursuant to Rule 14-305 only as to ‘exceptions to the sale.’” *Bates*, 417 Md. at 319, 9 A.3d at 852 (Italics in original, underline added). Accordingly, the Bates Court explained that “Rule 14-305 is not an open portal through which any and all pre-sale objections may be filed as exceptions, without regard to the nature of the objection or when the operative basis underlying the objection arose and was known to the borrower.” *Bates*, 417 Md. at 327, 9 A.3d at 857.

\***10** Here, Appellants' challenge did not concern any procedural irregularity of the November 12, 2010 foreclosure sale itself, and therefore was an insufficient basis to set aside a foreclosure sale on post-sale Rule 14-305 exceptions. *See id.*

Moreover, the operative facts upon which Appellants relied in support of their argument were available to the Appellants prior to the November 12, 2010 foreclosure sale date. Indeed, all of the disputed transfers of the Note occurred prior to filing of the Order to Docket on November 12, 2009, one full year before the property was auctioned. Further, Appellants did not dispute that they received proper service of the foreclosure papers, which included a copy of the Note with its challenged endorsements. Because the advanced argument was ripe and available to the Appellants well in advance of the November 12, 2010 foreclosure sale, it could only have been raised through “Rule 14-211's pre-sale injunctive relief apparatus,” rather than in post-sale exceptions. *See Bates*, 417 Md. at 329, 9 A.3d at 858.<sup>4</sup>

Accordingly, Appellants' challenge to Biltmore's rights in the loan should have been made pre-sale. Not only did Appellants fail to assert such claim pre-sale, but they recognized the validity of the loan in their bankruptcy filings (and their obligation to repay it in the context of their Chapter 13 proposed plan), as well as in \***11** their emergency pre-sale motion seeking a 60-day extension of the sale. As to the latter, because they claimed they had a loan modification agreement with BSI, and claimed that they were eligible for further modification under HAMP, they essentially claimed that as their holder, Biltmore was obliged to afford them a loan modification.

In an attempt to expand the scope of an exceptions hearing, Appellants rely on *Bierman v. Hunter*, 190 Md. App. 250, 988 A.2d 530 (2010). However, as explained by Bates, such reliance is “misguided.” *Bates*, 417 Md. at 327, 9 A.3d at 857. In that case, Ms. Hunter claimed her signature was a forgery, and therefore asserted a challenge to the validity of the underlying deed of trust. Here, in contrast there is no dispute concerning the deed of trust's validity. Moreover, in *Bates* the Court of Appeals expressly rejected Ms. Bates attempt to rely on *Hunter* to expand the scope of an exceptions hearing, explaining:

To the extent that *Bierman* may be perceived as attempting to confine our *Greenbriar* holding to its particular circumstances, i.e., where there is a “sum due and it is conceded that some sum is due and in default,” *Bierman*, 190 Md. App. at 266, 988 A.2d at 540, we hold that such a view would be misguided. *Greenbriar* was meant to be (and is) an explanation of the proper and general framework, structured in Rules 14-211 and 14-305, that a homeowner/borrower must follow when he or she seeks to raise pre- and/or post-sale objections in a foreclosure proceeding. *Greenbriar*, 387 Md. at 688, 878 A.2d at 531.

[A] homeowner/borrower ordinarily must assert known and ripe defenses to the conduct of a foreclosure sale prior to the sale, rather than in post-sale exceptions.

\***12** *Bates*, 417 Md. at 327-28, 9 A.3d at 857-58 (Emphasis added).<sup>5</sup>

**A. Even if Appellants had timely challenged Biltmore's rights, the record confirms that Biltmore was the proper secured party to initiate foreclosure proceedings.**

Even if Appellants had raised the issue prior to the foreclosure sale itself, the record establishes that Biltmore was the holder of the Note, and as such, was entitled to appoint the substitute trustees. Specifically, in addition to the Affidavit of Ownership, the original note was presented to the Court, properly endorsed. [E. 152-154]; *See McKirgan v. American Hospital Supply Corporation*, 37 Md. App. 85, 88, 375 A.2d 591 (1977) (“The production of the instrument establishes possession.”).

Furthermore, a close examination of the Note reveals that it was specially indorsed directly to Biltmore, making Biltmore the Note's holder. A special indorsement is an “indorsement that identifies a person to whom it makes the instrument payable.” [Md. Code, Comm. Law §3-205\(a\)](#). The legal effect of a special indorsement is that the “instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person.” *Id.* When a commercial instrument such as the Note is both specially indorsed and physically transferred, the indorsee “becomes its holder.” [Md. Code, Comm. Law §3-201\(a\)](#).

\*13 The Note itself includes special endorsements by the original payee, Corestar **Financial** Group, LLC to Option One Mortgage Corporation (“Option One”). [E. 1-5] [E.4]. In turn, Option One endorsed the Note by a printed Allonge identifying the loan, and Biltmore's name was handwritten in as payee. [E.5]

Under Maryland [Code, Comm. Law §1-201](#), as a “person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession,” Biltmore is a holder of the Note. [Md. Code, Comm. Law §1-201](#). As “holder of a note secured by a deed of trust,” Biltmore qualifies as a “secured party” entitled to invoke foreclosure proceedings pursuant to both Maryland law and the loan documents. *See Md. Rule 14-202(q)(2)* (“Secured party” means any person who has an interest in property secured by a lien or any assignee or successor in interest to that person. The term includes... (2) the holder of a note secured by a deed of trust or indemnity deed of trust;”). Therefore, even if Appellants had properly raised their challenge pre-sale (which they did not), the record conclusively established that Biltmore was the proper secured party to have initiated foreclosure proceedings.

To the extent that Appellants seek to challenge the timing of the endorsement, the Substitute Trustees advised that Option One endorsed the note in blank, per its general practice, [E.153] which was then converted into a special endorsement pursuant to [Md. Code, Comm. Law §3-205](#).<sup>6</sup> And while Appellants claim that \*14 Biltmore did not exist at the time of the endorsement,<sup>7</sup> it undoubtedly existed at the time the order to docket was filed, at the time of the foreclosure, and at the time of the exceptions hearing.<sup>8</sup>

Moreover, the signature constituting an endorsement is presumed authentic, see [Md. Code, Comm. Law §3-308\(a\)](#)(“In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized...”), and may even be \*15 ratified after the fact. *See Md. Code, Comm. Law §3-403(a)* (“An unauthorized signature may be ratified for all purposes of this title.”).<sup>9</sup> To the extent that Appellants desired to challenge the signatures, they must have specifically denied the same in their pleadings, [Md. Code, Comm. Law §3-308\(a\)](#) (“In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.”), prior to the sale. *See Bates, supra*. Rather than denying the signature at that time, consistent with their admissions in their bankruptcy case, Appellants claimed that they were in a loan modification program with BSI.

Further, as alluded to by substitute trustee [E.153], even if Option One had signed the Allonge in blank, and Biltmore thereafter protected itself by writing in its name on the endorsee line, then prior to its writing in its name (which it is authorized to do), Biltmore would be holder of the blank endorsed instrument. *See Md. Code, Comm. Law § 1-201(20)(a)*. And, pursuant to Maryland [Code, Comm. Law §3-205](#), the holder of a blank endorsement “may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.” [Md. Code, Comm. Law §3-205](#).

\***16** Finally, as to Appellant's assertion that Citicorp Global Markets Realty Corp was the proper noteholder, Maryland [Code, Comm. Law §3-305\(c\)](#) prohibits an obligor on a negotiable instrument from asserting rights of third person, except in limited circumstances, which requires the obligor to join the third-party to the litigation and also requires the third party to assert an interest in the obligation adverse to Biltmore. Specifically, Maryland [Code, Comm. Law §3-305\(c\)](#), provides in relevant part:

[I]n an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (§ 3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor [1] if the other person is joined in the action and [2] personally asserts the claim against the person entitled to enforce the instrument...

Md. [Code, Comm. Law §3-305\(c\)](#). Thus, Appellants could not avail themselves of a defense premised upon Citicorp's claim to the instrument, absent joining it to the proceeding, and for Citicorp to assert an interest in the Note adverse to Biltmore.<sup>10</sup>

\***17** Moreover, the record as a whole rejects Appellants' claim: Appellees presented the original note, properly endorsed; and Appellants' recognized Biltmore and its servicer BSI in their bankruptcy filings as secured creditor, [Apx-2][Apx-8], acknowledging that they were owed the debt. In their motion to stay the sale, Appellants recognized the legitimacy of the foreclosure by requesting a stay to pursue their alleged loan modification with BSI. Moreover, in requesting that the sale be postponed for 60 days (which did not occur until nearly three months after the motion was filed), they did not deny Biltmore's right to invoke foreclosure proceedings or enforce the loan. Accordingly, there is no legitimate issue concerning Biltmore's right to enforce the loan as transferee of the note. *See Md. Code, Comm. Law §3-301, Md. Code, Comm. Law §3-203.* Moreover, even Appellants' expert testified that Option One was acquired by AHMSI, who had informed Appellants that BSI was their new servicer. [E.147 lines 11 through 14].

In sum, even if Appellants had challenged Biltmore's right in the loan presale, the record confirms that Biltmore was the holder of the Note, and entitled to have the property foreclosed to secure repayment of that obligation.

**\*18 II. APPELLANTS' RECEIPT OF THE FEDERALY REQUIRED NOTICES THAT THEIR LOAN WAS TRANSFERRED AFTER THE SALE DOES NOT AFFECT THE RATIFIED FORECLOSURE SALE.**

The remainder of Appellants' argument focuses on federally required correspondences they received in late 2011, over eight months after ratification of subject foreclosure sale. *See* App.'s Br. at pp. 8-10. Appellants allege that the documents reflect a transfer or the Note's ownership and servicing rights from Biltmore to Goshen Mortgage LLC. *Id.* Appellants further allege that the new owners failed to credit the ratified sales price, yet that assertion finds no support in the documents attached to the brief. [A. 1-10].<sup>11</sup>

As an initial general matter, in an ordinary civil action, the existence of litigation does not preclude a party from transferring its rights to another. Nor does such transfer require dismissal of an existing suit. Rather, the Maryland Rules provide for the substitution of a party both at the trial court and on appeal. *See Md. Rule 2-241; see also Md. Rule 8-401(b)* ("The proper person may be substituted for a party on appeal in accordance with Rule 2-241." (Emphasis added)).

Under [Rule 2-241](#), "[a]ny party to the action, any other person affected by the action, the successors or representatives of the party, or the court *may* file a notice in the action substituting the proper person as a party. The notice shall set forth the reasons for the substitution and, in the case of death, the decedent's representatives, domicile, and date and place of death if known. The notice shall be served on all \***19** parties in accordance with Rule 1-321 and on the substituted party in the manner provided by Rule 2-121, unless the substituted party has previously submitted to the jurisdiction of the court." *Id.* (Emphasis added). *See also Goldman v. Walker, 260 Md. 222, 225, 271 A.2d 639, 640-641 (1970)* (superseded on other grounds, but providing that action

does not abate where remaining property rights to be determined, and relying upon former Maryland Rule 22 b which provided that “An action in equity shall not abate by the death of a party thereto, where the right involved in the action survives.”).<sup>12</sup>

Thus, in a civil case, the transfer of an interest in an action would allow for the substitution of a party upon motion. Moreover, even in a civil case, the provisions for substitution are permissive, not mandatory. *See Md. Rule 2-241; see also Md. Rule 14-217* (“A person entitled to release or assign a claim under a lien *may* file a written release or assignment of the claim and of any order for the sale of the property entered in the action. The release or assignment shall be signed and acknowledged before an individual authorized to take acknowledgments of deeds. The release or assignment shall take effect at the time of entry on the docket.”) (Emphasis added).

\*20 In a foreclosure proceeding, the substitute trustees are the plaintiffs prosecuting the foreclosure case. *See Md. Rule 14-204(a)(1)* (“[A]ny individual authorized to exercise a power of sale may institute an action to foreclose the lien.”). Thus, regardless of the transfer of the note, the substitute trustee remains trustee. *See generally Md. Rule 14-218*. Accordingly, Appellees remain Substitute Trustees and no substitution of a party is required.

As to the correspondences themselves, under federal law, the new owner or assignee of the debt is required to provide the borrower notice of such transfer. *See 15 U.S.C. §1641(g)(1)* (enacted May 20, 2009).<sup>13</sup> Likewise, under federal law, both the new and old loan servicer are each required to notify a borrower of a change in the loan servicer. *See 12 U.S.C. §2605(b)*. Moreover, federal law preempts state law regulating notice to the borrower at the time of such transfer. *See 12 U.S.C. §2605(h)* (“[A] servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time... transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.”)

Nor does a post-sale and post-ratification transfer of the Note's ownership and servicing rights affect any procedural irregularity of the foreclosure sale itself, and is therefore an insufficient basis to challenge the foreclosure through *Rule 14-305* \*21 exceptions. *See Bates, 417 Md. at 327, 9 A.3d at 857*. Appellants' attempt to bootstrap evidence of a post-sale transfer to previously litigated exceptions should be rejected, as this Court is not the forum to take in evidence and/or exercise original jurisdiction. *See Md. Rule 8-131(a)*. And even if this Court would take such evidence, it confirms Biltmore's rights in the loan at the time it invoked its foreclosure remedy.

As to the sale proceeds, although the property has been sold and the sale ratified, ratification is subject to the present appeal. Further, the audit is pending. *See Md. Rule 14-215 (a)* (“The procedure following a sale made pursuant to this Chapter shall be as provided in *Rules 14-305 and 14-306*, except that an audit is mandatory.”).

To the extent Appellants seek to assert that challenge the distribution of the sale proceeds, and complain the foreclosure sale proceeds were not properly credited to the debt, such claims are not ripe, and can only properly be brought as exceptions to the auditor's report pursuant to *Maryland Rule 2-543*. *See Greenbriar, 387 Md. at 742, 878 A.2d at 564* (“Determination of the precise amount of the debt, however, is reserved to examination of the auditor's account. It is unnecessary-and incorrect-for the trial judge to rule upon the propriety of the debt amount prior to the audit or to depend upon the audit as a prerequisite to a consideration of the ratification of the sale. The correct procedure is that the ratification of the sale itself is first considered and if the sale was not procedurally irregular and the price is not unconscionable, it is ratified.”). Thus, Appellants' attempt to use the federally required correspondence to attack ratification of the foreclosure sale should be rejected.

## \*22 CONCLUSION

Appellants' attack by way of exceptions, upon the secured party's right to foreclose was not timely. Any challenge to Biltmore's right to invoke foreclosure should have been made presale. Rather than challenging Biltmore's rights, they conceded it - in their bankruptcy Chapter 13 plan, in their bankruptcy schedules, in their motion to stay, and even through their proffered expert.

As to Appellants' claim that Biltmore has sold its rights in the loan (not surprising given the lapse of time since default), such circumstance does not allow for revisiting the exceptions, nor does it affect the appeal of the exceptions or deprive the Substitute Trustees of their power or authority in connection with the sale. Any claim regarding crediting of the sale proceeds would not be ripe until the audit.

Accordingly, Appellees respectfully request that the order of the Circuit Court for Carroll County be *affirmed*.

**Appendix not available.**

**Footnotes**

- 1 Appellees are Jeffrey Nadel, Esq. and Scott Nadel, Esq. as substitute trustees.
- 2 The record reflects that Appellants appeared to make a payment on January 2, 2009, yet that payment was retroactively applied to their April 2008 mortgage obligation.
- 3 Attached to Appellants' Exceptions were two affidavits of purported "forensic loan auditors." [E. 43-64]. The Federal Trade Commission recently recognized forensic mortgage loan audits to be "the latest foreclosure rescue scam to **exploit financially strapped homeowners**[.]" <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm>.
- 4 In an effort of historical revision, Appellants now claim that for 15 months, they were unsure of whom to pay. *See* App. Br. at 2. Such claim reinforces the requirement that they assert their pre-sale objection timely. Moreover, had they been sincerely uncertain, they could have interpled their payments into the circuit court, instead of filing serial bankruptcy petitions. In any event, Appellants' confusion is not indicated on their successive bankruptcy petitions, which do not identify the loan as contingent or disputed. Nor did Appellants proffer any evidence that they were confused; in fact, they were trying to negotiate a modification agreement with BSI. [Apx-11].
- 5 Even in the context of a pre-sale challenge, the Court of Appeals has rejected Borrower's claims of lack of standing, even assuming a promissory note is not properly endorsed, and where the chain of transfers is unproven, where the borrower subsequently concedes that secured party currently holds a note. *See Anderson v. Burson*, \_\_\_ Md. 2011 Lexis 777 (Dec. 20, 2011), motion for reconsideration filed. Unlike the present case or *Bates, Anderson* involved a pre-sale challenge, and denial of a motion to enjoin the sale.
- 6 The date printed on the Allonge in the lower right hand corner is November 15, 2006.
- 7 Appellants' assertion relied upon her expert's examination of the United States Securities and Exchange Commission ("SEC") records. However, the SEC does not create entities, it merely regulates certain publicly held entities, requiring reporting by entities having a certain minimum number of investors. When the number of investors, or the type of investors are not above the minimum threshold, an entity no longer needs to report. *See 17 C.F.R. 240.12h-3* (Rule 12-h-3); *17 C.F.R. 240.15d-6*. In contrast, entities are generally created under state law, the national banking act, or under the common law governing the creation of trusts.
- 8 In a comparative situation, under the doctrine of estoppel by deed, the grantor of an interest in land will be estopped from challenging its own conveyance. *See Thompson v. Gue*, 256 Md. 32, 37, 259 A.2d 272, 275-276 (1969) ("In other words, it rests upon the inequity of allowing the party estopped from asserting a contrary position. The principle is that when a man has entered into a solemn engagement by deed, he shall not be permitted to deny any matter which he has asserted therein, for a deed is a solemn act to any part of which the law gives effect as the deliberate admission of the maker; to him it stands for truth, and in every situation in which he may be placed with respect to it, it is true as to him. It has been stated that it is a mistake to liken an estoppel by deed to an estoppel in pais. It has also been stated, speaking of estoppel by deed in general that the true principle of estoppel, as applicable to deeds, is to prevent circuity of action and to compel parties to fulfill their contracts."). Thus, if that construct is applied to endorsements, then it would seem incongruous that a borrower could challenge the endorsement by Option One, when Option One itself would be estopped from challenging its endorsement.
- 9 Appellants own purported "expert" indicated in her affidavit that Option One itself had been acquired by AHMSI, [E.95] and proffered that on August 14, 2009, AHMSI advised Appellants that the servicing of the loan was transferred to BSI, which she conceded was linked to Biltmore, who appointed the substitute trustees the following month. [E.147] The expert also conceded that although the bankruptcy case initially identified AHMSI as the creditor on the loan, by June 1, 2010, the bankruptcy case reflected that the secured creditor was BSI. [E.148].
- 10 Appellants sole basis for its claim that Citicorp was the proper noteholder rested upon an Affidavit of Lost Assignment of Deed of Trust" purportedly recorded in the land records. However, Maryland does not recognize assignments of deeds of trust as instruments of transfer. *See also Le Brun v. Prosise*, 197 Md. 466, 474-75, 79 A.2d 543, 548 (1951) ("The deed of trust need not and properly

speaking cannot be assigned like a mortgage,... but the note can be transferred freely, and, when transferred, carries with it the security,... “The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”); *See also Fagnani v. Fisher*, 418 Md. 371, 388-89, 15 A.3d 282 (2011) (recognizing that a person who acquires an original promissory note by assignment becomes, as a matter of law, the secured party and beneficiary under the associated deed of trust); *Horvath v. Bank of New York, N.A.*, 641 F.3d 617 (4th Cir. 2011) (same holding). Indeed, in light of the holding in Le Brun, the Office of the Attorney General’s advised that such “an agreement or endorsement purporting to effect an assignment of a deed of trust should properly be viewed as *superfluous as a matter of law and certainly unnecessary to secure any bona fide holder in due course of the promissory note.*” 1978 Md. AG Lexis 57; 63 Op. Atty. Gen. Md. 87 (emphasis added). In any event, Appellants purported expert testified that by June 1, 2010, the bankruptcy case reflected that the secured creditor was BSI, [E.148], and there being only one original note, it was produced by Appellees.

- 11 The sales price of \$440,000 failed to satisfy Appellants' outstanding mortgage debt.
- 12 Under [Maryland Rule 1-201](#), which furnishes general rules of construction, “[the] rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay. When a rule, by the word ‘shall’ or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those prescribed by these rules or by statute. If no consequences are prescribed, the court may compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.” [Md. Rule 1-201](#).
- 13 Notably, neither Appellants nor their expert proffered any testimony or other evidence that, prior to the foreclosure, they received a required federal notice from any other creditor or loan servicer that was inconsistent with Biltmore's rights.